

No. 20267

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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SANTA ANITA MFG. CORP., a California corporation,

*Appellant*

*vs.*

MAX J. LUGASH and MAXON INDUSTRIES, INC., a California corporation,

*Appellees-Cross Appellants,*

*vs.*

SANTA ANITA MFG. CORP., a California corporation,

*Cross Appellee.*

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## APPELLANT'S REPLY BRIEF.

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C. A. MIKETTA,  
WILLIAM POMS,  
GUY PORTER SMITH,  
of

MIKETTA, GLENNY, POMS &  
SMITH,  
210 West Seventh Street,  
Suite 909,  
Los Angeles, Calif. 90014,  
*Attorneys for Appellant.*

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## APPELLANT'S REPLY BRIEF.

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### INTRODUCTION.

Defendant (appellant) has not and does not assert that the district court erred in every finding as represented by plaintiffs (Ans. Br. of App., p. 1). The district court actually made basic findings of fact favorable to defendant which compel a holding of invalidity for Lugash '227 as a matter of law. It was and is defendant's position that that structure defined in the Lugash '227 apparatus claims is fully found in the old (1940) loader of Novotney '403 including the only alleged new element in the claims, *i.e.* "hinge means permitting inversion of the platform". Also, that the prior Narvestad, Peters and Jester patents specifically solve the same dock load-

ing problem faced by Lugash in the identical manner by folding the loading platform about hinge means and storing it up under the truck bed in an out-of-the-way position.

The district court **agreed** with defendant in finding that the Novotney '403 loader platform **can be inverted** over the lifting arms [Find. 16, Vol. I-B, p. 666]. It correctly found that each of the Narvestad, Peters and Jester patents disclose the folding or inverting of a platform by its hinge means over the lifting arms into an inverted out-of-the-way position [Find. 19, Vol. I-B, p. 667]. It is therefore principally the trial court's error in applying the law and its interpretation of the legal effect of basic fact findings that are carefully specified by defendant in its Appellant's Opening Brief (pp. 10-15).

Each of defendant's specification of error paragraphs states a single error in the topical sentence with further particularities of the error set out thereafter. Plaintiffs' bitter attack upon defendant's brief (Ans. Br. of App. pp. 2-3) is wholly unwarranted. Defendant's entire brief is shorter than the objectionable fifty-six page statement of the case in *Thys Co. v. Anglo-California National Bank*, 219 F. 2d 131, 132 (C.A. 9, 1955), referred to by plaintiffs. Certainly this court does not want uninformative ultimate conclusions or mere disgruntled objections (as in the Op. Br. of Cross Appellants, pp. 10, 11):

"Assignment 3 is: 'That the evidence was and is insufficient to justify or support the verdict of the jury and/or the judgment.' This is not a proper or sufficient assignment of error \* \* \*"

*Mutual Life Insurance Co. v. Wells Fargo Bank & Union Trust Co.*, 86 F. 2d 585 (C.A. 5, 1936).

## THE LUGASH '227 COMBINATION IS FOUND IN NOVOTNEY '403.

In their anxiety to rebut the devastating effect of the anticipatory prior art Novotney patent, plaintiffs have completely misrepresented and falsified in every statement made thereon in their brief with the single exception of argumentatively admitting that the trial court found that the platform 9 of Novotney could be folded back over the lifting arms, as shown in defendant's Exhibits AM-1 and 2 (Ans. Br. of App. pp. 7-9, pp. 39-44).

The first outright misrepresentation of Novotney '403 by plaintiffs is on the trial testimony of Mr. Gabriel, stating that he "admitted" that no prior art patent shows the combination of parallel linkage systems and invertible platform. Plaintiffs repeat this falsity through their brief (Ans. Br. of App., pp. 3-4, 7; 39). pointing to pages 786-787 of the transcript. Plaintiffs deliberately conceal the fact that the entire line of questioning referred to and the answers given were "**apart from Novotney**" (Vol. III, p. 784).

*"Apart from Novotney, which we have covered, '403, is there any prior patent in Exhibit C or Exhibit D which shows a platform which is inverted over a parallel rule linkage system?"*

"A. No, there is no patent in these two books *other than Novotney* that would show a platform over a parallel rule linkage system per se.

Q. All right. A. There are three that we have pointed out; Peters, Jester and Narvestad, which show a platform inverted over a linkage system, which would be the equivalent of a parallel



rule system in this art, and there are platforms that swing under and . . .” (Vol. III, pp. 784-785, Emphasis added).

There is no admission as improperly asserted by plaintiffs. Novotney '403 discloses the Lugash '227 combination exactly. The overwhelming weight of Mr. Gabriel's testimony on the anticipatory effect of Novotney '403 (Vol. I-A, pp. 268-275; Vol. III, pp. 703-714) was never refuted by plaintiffs.

**DEFENDANT'S EXHIBITS AM-1 AND 2 CORRECTLY ILLUSTRATE THE FOLDING OF THE NOVOTNEY '403 PLATFORM FOUND BY THE TRIAL COURT.**

Plaintiffs are forced to attack the Exhibits AM-1 and 2 indirectly on fabricated issues because they have not and can not answer the compelling logic of the exhibits and Mr. Gabriel's testimony on the merits. The first figure under the heading Novotney on each of Exhibits AM-1 and 2 is Figure 1 of the Novotney patent with irrelevant part numbers removed and relevant parts colored for clarity. The second figure under the Novotney heading is a representation of the Novotney structure illustrating Mr. Gabriel's testimony that the platform can be folded over the lifting arms to obtain the identical result of Lugash '227. It was clearly presented to and **accepted** by the trial court as such, the court stating:

“THE COURT: He was merely trying to demonstrate how it could be folded over.” (Vol. III, p. 751).

“THE COURT: As far as I am concerned they are illustrative of the fact that this platform can fold over.” (Vol. III, p. 752).



**PLAINTIFFS FAILED TO SHOW THAT THE  
NOVOTNEY PLATFORM CANNOT BE  
FOLDED BECAUSE OF STRUCTURAL  
DIMENSIONS.**

It was obvious to both Messrs. Vogel and Gabriel that the Novotney platform 9 can be folded "clear over" without modification (Vogel, Vol. III, pp. 699-700, 777-778). Plaintiffs offered no direct testimony by Mr. Comstock on Novotney at the trial (Vol. III, pp. 867-881) beyond the pre-trial mere general denial of folding in Novotney (Vol. I-A, p. 206). At trial, under cross-examination, Mr. Comstock argued that *if* the platform lugs mounting the platform 9 to the yoke member 8 had a certain contour and *if* the platform 9 were "substantially longer than it is shown here" (Vol. III, p. 894), it could not be folded over the lifting arms. The trial court rejected Mr. Comstock's conjecture on what would happen *if* certain modifications were made in the patent disclosure.

Plaintiffs' argument that the Novotney platform can not be folded because it would hit the truck bed D (Ans. Br. of App., pp. 45-50) was also lost at the trial. Mr. Comstock asserted that if the Novotney '403 platform was to fold up, it could be no more than "possibly 24 inches, which I think is still smaller than would be practical" (Vol. III, p. 896) and that 30 inches would be standard (Vol. III, p. 897). But Mr. Comstock was confusing the platform length with the lifting arm length of 30 inches. He admitted his confusion and changed his answer to state that a 22 inch platform was the average (Vol. III, pp. 897-898). Thus, according to plaintiffs' own expert, an *average* platform of 22 inches could be

easily folded up in the Novotney loader, there being a full 24 inches of platform clearance.

After having rested their case, plaintiffs realized their failure to show that the Novotney platform would not fold up under the truck bed as convincingly shown by defendant's witnesses and exhibits. They therefore connected a false argument on an exhibit attached to their trial brief which was prepared *after* trial, which is not part of the evidence and was never subject to cross-examination. It is not evidence and cannot be considered as such. Plaintiffs have devoted almost an entire page of their brief (Ans. Br. of App. p. 42) arguing that red dotted lines placed on the exhibit extrajudicially by plaintiffs' counsel evidence plaintiffs' post trial contention that the Novotney '403 platform can not fold. Plaintiffs' false exhibit and over reaching argument thereon should be completely disregarded by this court. The trial court correctly found that the platform 9 can be folded, as illustrated in Exhibits AM-1 and 2. Your Honors can easily see how each and every feature, structure and result of Lugash '227 is found in Novotney '403 by reading the claim language set out therein on the similarly colored parts in both Lugash '227 and Novotney '403 illustrations in these Exhibits AM-1 and 2.

### **Powered Raising of the Inverted Novotney '403 Platform Is Conceded.**

Plaintiffs do not argue that the power means of Novotney can not be used to raise the parallelogram lifting arms with the platform inverted thereon. They only contend that such powered raising would not be "fully" up under the truck bed (Ans. Br. of App., pp. 8, 45-48). The **functions** of a **power means**

and of a **parallelogram linkage** system as active elements in both “stowing and loading operations” (Ans. Br. of App. pp. 5-7) are thus **conceded** after the Novotney '403 platform is inverted (a suggestion clearly taught by each of Narvestad, Peters and Jester).

Plaintiffs' only argument against full raising of the inverted platform by the power means is based upon the contention that the inverted platform, in hitting up under the truck bed, would prevent the yokes 8 of Novotney from entering “under the bed of the truck” (Ans. Br. of App. p. 45). Apart from the fact that the Novotney '403 platform would have by then been stored out-of-the-way, obtaining the Lugash '227 result, the yoke or platform support member 50 of Lugash '227 does not enter up under the truck bed either. As seen in Fig. 1 of Exhibit 1 (or p. 1, Appx. C, App. Op. Br.) the Lugash yoke number 50 is placed outside the rear end of the truck bed B' under an unclaimed flange element, flange 61'.

The unclaimed body spacer or flange 61' protects the portion of the '227 loader extending out rearwardly of the truck bed from heavy fork lift trucks which would otherwise have to ride thereon during dock loading (Vol. III, pp. 316-317). It is this flange 61' which prevents the '227 platform from being raised into a tailgate position when the loader is elevated.

No modification of Novotney need be made to raise the platform up under the truck bed until it hits the underside thereof in a stored position. If any portion of the loader, such as yokes 8, protrude outwardly of the truck bed, a simple unclaimed and obvious flange 61' could be used. It would be unnecessary however

in view of the common practice of using dock plates or ramps to bridge the gap between the open end of the truck body and the dock as demonstrated by plaintiffs during the trial with the plaintiffs' Tuk-A-Way loaders (Vol. III, p. 856).

**THE OLD NOVOTNEY '403 LOADER STRUCTURE CAN NOT BE REPATENTED BECAUSE OF A SUPPOSED NEW METHOD OF OPERATING THE OLD STRUCTURE.**

The trial court refused to hold Lugash '227 invalid over Novotney '403 because it did not believe the folding of the platform was "necessary as a part of the manipulation" of the Novotney loader (Vol. III, p. 948). The plaintiffs' cases supposedly supporting such a requirement in a prior art device (Ans. Br. of App. p. 43) actually only deal with the definition of "inherency" required to support a claim before the patent office when rejected on the applicant's own insufficient disclosure. This is not the test for patentability over the prior art disclosure of *another*.

Plaintiffs did not distinguish the holding in *Huston v. Buckeye Bait Corp.*, 107 U.S.P.Q. 138 arguing the construction of the device (it was actually a combination of a weight and sinker acting on opposite sides of a cork) and pointing out that tests were conducted by expert witnesses before that court. Such test, unnecessary in this case, could not in fact have been conducted on the old (1940) Novotney '403 loader which was not *now* commercially available and which was *not* one of the Novotney loaders which defendant's president had seen (Vogel, Vol. III, p. 60). But, as plaintiffs now admit on this appeal, the **district**

court below accepted defendant's experts testimony on Novotney '403 in finding it would fold. But must it have been a necessary manipulation in Novotney to anticipate?

The actual manipulation of a prior device in the same manner may be necessary to anticipate a **method** or **process** claim. But plaintiffs' patent attempts to monopolize a *structure*. The '227 claims do not require that the platform be folded, but only that it be pivoted on hinge means permitting inversion. As readily seen from defendant's Exhibits AM-1 and 2, the Lugash '227 claims actually define only the old *structure* of Novotney with hinge means *permitting* inversion of the platform.

"An old mechanism fully capable of a use not then observed, anticipates a later patent for the application of that means to the new use".

*Mathews Conveyor Co. v. Palmer-Bee Co.*, 135 F. 2d 73, 89 (6th Cir., 1943).

The applicability of the *Mathews* case (and the following line of cases relied upon by defendant in its App. Op. Br. pp. 32 and 33) was not refuted by plaintiffs.

Similarly:

"The trial judge found that the claimed 'resharpening' would occur equally with the Jeffrey 1909 machine if it were reversed frequently, in accordance with Battey's teachings. Thus, even if we assume that the so-called 'resharpening' effect was **unknown** in the prior art and that its discovery by Battey rises to the dignity of in-



vention, nevertheless **Battey's only discovery was a new manner of using an old machine.** Such a discovery is clearly not patentable. *Mathews Conveyor Co. v. Palmer-Bee Co.*, 6 Cir., 1943, 135 F.2d 73, 89." (Emphasis added)

*Pennsylvania Crusher Co. v. Bethlehem Steel Co.*,  
193 F. 2d 445, 449-450 (3rd Cir., 1951).

Lugash '227 is at best merely such a discovery of a "new manner of using an old machine." Furthermore, the folding concept of Lugash '227 was not "unknown" in the art but is admittedly suggested by each of the prior art Narvestad, Peters and Jester patents [Find. 19, Vol. I-B, p. 667].

**THERE ARE NO DIFFERENCES BETWEEN  
LUGASH '227 AND THE COMBINED  
STATE OF THE ART.**

Plaintiffs do not attempt to answer defendant's contention that the Findings fail to advise this court of any differences between Lugash '227 and the combined state of the art, such as Narvestad and Novotney, but chose to **"ignore this"** (Ans. Br. of App., p. 53). Neither do plaintiffs advise this court of any place in the trial record where any such differences were testified to. They only argue that defendant's witnesses were extensively cross-examined and that their witness testified to the contrary (Ans. Br. of App. pp. 3, 53-59). The record is to the contrary. For example, defendant's president, Mr. Vogel, testified on direct that the Narvestad patent would have made

it obvious to him in 1956 how defendant's prior art parallel arm hydraulic loaders could be modified to place the platform in an out-of-the-way position (Vogel, Vol. III, p. 462) and about the similarities between the prior art Novotney '403 hydraulically powered loader and defendant's own prior hydraulically powered loaders (Vogel, Vol. III, p. 480). A careful review of the cross-examination of Mr. Vogel (Vol. III, pp. 493-617) shows that plaintiffs' counsel never cross-examined Mr. Vogel on the Narvestad patent or its teachings as applied to Novotney or defendant's own prior art hydraulic loaders.

On cross-examination (Vol. III, pp. 761-838, 847-851), Mr. Gabriel was never questioned on his combination of the teachings of Novotney and Narvestad, Peters or Jester.

The only time that plaintiffs' counsel questioned plaintiffs' expert, Mr. Comstock, on the question of obviousness of more than one reference taken together was at page 870 of the trial transcript. There, Mr. Comstock only said that Lugash '227 was not obvious in view of the combination of Narvestad and Peters. But, Mr. Comstock distinguished *both* Narvestad and Peters, in his view, on the basis that neither had a parallelogram linkage (Comstock, Vol. III, pp. 868-870). Why didn't plaintiffs' counsel ask Mr. Comstock whether Lugash '227 would be obvious in view of the parallel arm loader of Novotney '403 in view of either Narvestad and Peters?



The combination of Narvestad and Novotney '403 is opposed on plaintiffs' false argument that the Novotney tailgate function would be lost if the platform were folded as suggested by Narvestad (Ans. Br. of App., p. 55). But, who testified that Novotney '403 would lose its tailgate function? It is plaintiffs' unclaimed flange 61' [Ex. 1] that prevents the Lugash '227 platform from acting as a tailgate. No such modification is necessary in Novotney, whose tailgate would continue to serve as a tailgate when desired. Plaintiffs also contend that all trucks now have a separate tailgate as original equipment (Ans. Br. of App., p. 13) so that **on their argument**, the loss of such function is not important.

Plaintiffs' arguments are presented apart from any trial testimony and are only **counsel's** own interpretation of the references. Plaintiffs' argument ignores (and thus admits) the obviousness of such combinations evidenced from the trial testimony of the **experts** and the **patent office** action of combining Narvestad with a hydraulically powered, parallel arm loader (Wood '135) in acting on the second Lugash patent [Ex. B, p. 17]. Wood '135, Narvestad and Novotney '403 are all part of the same art. Workers in the art are entitled to the sum of the arts' teachings. Lugash '227 contributes nothing in addition to the sum of prior hydraulically powered loaders (Novotney '403, Wood '135 and defendant's prior loaders) and prior folding platform loaders (Narvestad, Peters and Jester).

THE COMBINATION OF THE PRIOR ART  
FOLDING PLATFORM CONCEPT WITH  
KNOWN POWERED LOADERS IN 1956  
PRODUCED THE EXPECTED RESULT  
OF POWERED RAISING OF A FOLDED  
PLATFORM.

The function of the power means in raising the inverted platforms of Novotney '403 and Narvestad (App. Op. Br., pp. 37-38; Gabriel, Vol. III, pp. 800-801) is not opposed, plaintiffs only pointing out that in Narvestad there is a **prior** manual pivoting of the platform (as in Lugash '227) and a **subsequent** manual telescoping of the lifting arms (Ans. Br. of App., pp. 9-11). But in each, it is the natural and expected function of the power means to raise and lower the heavy loader parts whether the platforms are extended or inverted.

In the Novotney '403, Wood '135 and defendant's own prior art hydraulic loaders [Find. 11, Vol. I-B, p. 665; Exs. F. through O; Vogel, Vol. III, pp. 412-415] the power means *must* be operated to raise the lifting arms because of the rigid mechanical connections between the lifting arms and the hydraulic cylinders piston rods.

Defendant demonstrated at the trial and the district court correctly found that it was "a simple matter and did not require retooling" nor changes "major in character" to modify defendant's own prior art powered EB 1500 unitary construction loader to make its platform invert [Finds. 11 and 13A, Vol. I-B, p. 665]. To obtain the stowable loader, all that was necessary was to take an existing hydraulically powered, parallel arm loader and simply

invert the platform. If it had been a manually operated loader, the platform would have been stored manually. But, it was a powered loader and the powered raising of the manually inverted platform up under the truck bed was the **natural, obvious, expected** and in fact, **only** way the prior art device could be operated once the platform was manually inverted.

“These elements, when placed in aggregation, did not functionally operate differently than before. The pumps operated as pumps and the injector system operated as injectors, and the force of gravity operated as usual. We decide that none of these changes resulted in a new functional mode of operation, a development different in essential character or an unforeseeable improvement not obvious to mechanics skilled in the art.”

*Jacuzzi Bros., Inc. v. Berkeley Pump Co., et al.*,  
191 F. 2d 632, 637 (C.A. 9, 1951).

### **LUGASH '227 WAS LIMITED TO THE FOLDING CONCEPT BEFORE THE PATENT OFFICE.**

Contrary to the impression plaintiffs wish to make, the “basic combination” claimed by Lugash in his original application was that of an ordinary powered parallel armed load lifter [Ex. A, p. 11, claim 1]. The first object and original claim of Lugash '227 were not directed to the supposed basic combination of invertible platform and parallel linkage as asserted by plaintiffs (Ans. Br. of App. pp. 20-22). Lugash was required to specifically limit each of his claims to the “folding up aspect” of the platform and hinge means [Ex. B, pp. 21-24] to obtain issuance of the patent

just as the patentee in the *Calmar v. Cook* case (cited as *Graham v. John Deere Co.*, 383 U.S. 1, 86 S.Ct. 684) was required to distinguish over the prior art there cited. The *Calmar* case so-called Jepson type claims are still combination claims as here. The principal difference is in the failure of the Patent Office to consider or cite any patent pertinent to folding platforms or even dock loading in this case.

### **LUGASH '227 DOES NOT MEET THE UNEXPECTED RESULT TEST OF UNITED STATES v. ADAMS.**

The Lugash '227 claims, limited to the folding-up aspect of the platform by the Patent Office, fail to meet the strict requirement of a "wholly unexpectedly" obtained result required in the *United States v. Adams*, ..... U.S. ...., 86 S.Ct. 708. **In Lugash '227 the folding up aspect is not unexpected in a vehicle loader.** That is clearly taught in each of Narvestad, Peters and Jester vehicle loaders. The provision of the pivotable Narvestad platform in a hydraulically powered loader such as Novotney '403, Wood '135 or defendant's prior loaders also produces the wholly **expected** result, a powered raising and lowering of the lifting arms and the platform whether it is extended or pivoted over.

In *Adams, supra*, the government had admitted that the result obtained was "unexpected" and the unchallenged testimony of the experts was that the "Skrivan-off" formulation relied upon by the government "was both dangerous and inoperable". (86 S. Ct. at 714).

In this case there is no such admission and absolutely **no expert testimony showing any unex-**

pected result. The weight of the evidence is to the exact opposite. The district court's findings do not even attempt to point out any result which could be considered unexpected. Patentability for Lugash '227 was predicated only on a more "facile and efficient manner" of operation for the loader, not an *unexpected* manner of operation thereof as required by the *Adams* case, *supra*.

### THE EXHIBIT E-G AND AD LOADERS ARE A PART OF THE PRIOR ART.

Defendant relied upon its Exhibits E-G and AD to illustrate the prior art loaders commercially available prior to Lugash '227 which allowed dock loading by heavy fork-lift trucks. As plaintiffs are well aware, each of the loaders illustrated in defendant's Exhibit E-G were shown to be in the prior art by reference to the corroborating prior art patents of Exhibits C and D and Exhibit AB by Mr. Vogel at trial (Vol. III, pp. 389-402). The Daybrook loader which allows dock loading of pages 12 and 13 of Exhibit E-G was dated by the prior art Roberts patent (Vogel, Vol. III, pp. 396-400).

Exhibit AD, while undated, was given a prior art foundation by **both** plaintiffs' witness Goodman (Vol. III, pp. 74-76) and defendant's Mr. Vogel (Vol. III, pp. 409-411).

Plaintiffs knew of this relation between Exhibits E-G and AD and the other prior art patents and prior art brochures, but through omission and understatement have attempted to deliberately mislead this court into believing that the Exhibit E-G and AD loaders are not a part of the prior art (Ans. Br. of App. pp. 3, 14, 29, 37 and 67).



## DEFENDANT'S RAMPING ACTION LOADERS DO NOT EMPLOY PARALLELOGRAM LINKAGE.

Plaintiffs attempt to confuse defendant's ramping action loaders with its "level ride" loaders which still have a slight ramping. **None of defendant's loaders employ exactly parallel lifting arms.** The so-called "level ride" platform loaders have a slight ramping action to overcome the settling of the truck bed on its springs during loading a heavy object onto the rear of the truck bed (Vogel Vol. III, p. 436). But defendant's ramping action platform loaders do not have parallel arms (Vol. III, p. 434) and are intended for use with "less unstable loads" (Vol. III, p. 553).

On his deposition, Mr. Vogel stated that the defendant's brochure showed a parallelogram linkage in a "broad sense" but that you couldn't tell from the drawing whether the arms were parallel or "slightly unparallel" [Ex. 18, p. 114]. He never admitted that all double arm loaders are parallelogram loaders as plaintiffs contend. He knew that even a so-called parallelogram arm loader should have slight ramping action to accommodate settling of the truck, **a fact apparently unknown to Lugash.** Thus, Vogel could not be sure whether Novotney (Vol. III, pp. 611-612) had lifting arms exactly parallel or preferably, slightly unparallel.

Plaintiffs improperly attempt to include within Lugash '227 load elevators with lifting arm linkages which are **purposely not parallel.** Although the difference in center spacing is small, the result on the end of at least 30 inches of lifting arm and 22 inches of platform is quite pronounced [Ex. E-G p. 3].

## PLAINTIFFS ATTEMPT TO DISMISS THE MISMARKED LOADERS AS MINIMAL.

There is no evidence as to how many or how few of the mismarked Model H-23 loaders were sold by plaintiffs. Plaintiffs falsely *assume* that their numbers were minimal and clearly are over reaching in stating so to this court (Ans. Br. of App. pp. 64-66).

The alleged common practice of marking devices as being manufactured under one or more of the "following patents" referred to by plaintiffs was not followed in this case and is irrelevant. Plaintiffs are forced to discuss common practice of **others** in an attempt to distract the court's attention from what plaintiffs actually did.

No evidence was presented to the effect that plaintiffs were advised by their counsel to put the '196 patent numbers on the H-23 models as was done. Mr. Lugash, the patentee must be presumed to know that his second patent was directed to unitary construction claimed therein. It should have been obvious to Lugash that placing the motor and pump up under the truck bed in the H-23 models was not within his unitary construction concept of the '196 patent. No excuse or explanation of an innocent mistake was ever offered and none can be found in the record.



## CONCLUSION.

Lugash '227 is no more than the sum of the prior art freely available to all persons working in the load elevator art. It produces no more than the results one would expect from a mechanic skilled in the art. Plaintiffs have attempted to refute this simple truth by creating issues and exhibits not before the trial court. Their many false allegations pointed out herein evidence the error of their reasoning.

The entire record in this case, the experts' testimony on the combined state of the art and the completely insufficient district court findings of invention in only a more "facile" manner of operating old folding loading devices should compel this court to find Lugash '227 invalid. The trial court's conclusions of validity and infringement for Lugash '227 should be reversed. The court's finding of innocent mistake on the false marking issue should also be reversed.

C. A. MIKETTA,  
WILLIAM POMS,  
GUY PORTER SMITH,

of

MIKETTA, GLENNY, POMS &  
SMITH,

*Attorneys for Appellant.*



### **Certificate.**

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

GUY PORTER SMITH

